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No. 07-1512

In the
Supreme Court of the United States

ROBERT J. LUCAS, JR., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. In applying *Rapanos v. United States*, 547 U.S. 715 (2006), to determine federal jurisdiction over wetlands under the Clean Water Act, are federal courts bound to apply the analysis of the plurality decision, the concurrence, or some other standard?

2. Under whichever approach the Court chooses, did the Fifth Circuit err in holding that federal jurisdiction under the Act extends to a wetland that merely "neighbors" a "tributary" of a navigable water, without requiring that the wetland have a *continuous* surface connection with a relatively permanent body of water, or that it *significantly* affect the quality of traditional navigable waters?

3. Is an ordinary residential septic tank a "point source" under the Act and, if so, can one who designs or certifies the system but neither owns nor operates it be held criminally liable for its discharges?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government and seeks to balance environmental goals with individual rights and other social values.

PLF attorneys represented John Rapanos in *Rapanos v. United States*, 547 U.S. 715 (2006), on which this case turns and has participated in virtually every circuit court case interpreting that decision. PLF represented the landowners in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (cert. denied), and *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (cert. denied), and was amicus in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007) (cert. denied), and *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), below.

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[1] In accordance with Rule 37, Counsel of Record for all parties received notice at least ten days prior to the due date of the Amicus Curiae's intention to file this brief. The parties have provided written consent to the filing of this brief which has been lodged with the Clerk of this Court.

Amicus Curiae affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

On two occasions, PLF petitioned this Court to address a conflict among the circuits as to the application of *Rapanos* in determining federal jurisdiction under the Clean Water Act. Those cases (*Gerke* and *Johnson*) involved remand orders authorizing federal regulation of wetlands using contradictory legal standards. Certiorari was denied in both cases. This Court now is presented with a final decision from the Fifth Circuit which enlarges the conflict among the circuits and imposes long-term prison sentences on Petitioners. PLF submits this brief to urge this Court to resolve this conflict.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is a travesty of justice to imprison common citizens for ordinary conduct without either criminal knowledge or criminal intent. In this case, Petitioners Mr. Robert J. Lucas, Mrs. Robbie Lucas Wrigley, and Mr. M. E. Thompson have been sentenced to seven to nine years in federal prison (where they now are serving) and each fined millions of dollars for filling wetlands and installing professionally engineered residential septic systems without federal permits, even though the wetlands fail to satisfy any predictable standard for federal jurisdiction and the government has never required a federal permit for the installation of a residential septic system.

The subject wetlands were deemed jurisdictional because they "neighbor" nonnavigable intermittent "tributaries" (*i.e.*, swales and drainage ditches) that are alleged to connect to actual navigable waters miles away. The terms "neighboring" and "tributaries" are undefined and indeterminate so that even expert practitioners and government officials cannot agree on

their application. In over 35 years of enforcement of the Clean Water Act, the Environmental Protection Agency and the Corps of Engineers have never adopted a consistent standard for determining jurisdictional wetlands. Nor has the agency ever required a discharge permit for the millions of residential septic systems used nationwide. Those standards that are applied are subjective, inconsistent, and unpredictable. In a word: arbitrary. No reasonable person would or should have expected federal control to reach as far as the agencies now claim.

There is a growing trend among federal agencies and the courts to expand the enforcement power of the government incrementally by adopting regulatory interpretations that go beyond their plain meaning and intent. This case is a singular example of government overreaching. Under Fifth Circuit jurisprudence, innocent conduct becomes criminal. This is contrary to Supreme Court precedent and an assault on common sense. In the interests of fairness and justice, this Court should grant review and reverse the decision below.

Review by this Court also is warranted to resolve multiple conflicts among the lower courts as to how to interpret this Court's *Rapanos* decision and to identify the proper legal standard for determining Clean Water Act jurisdiction.

In *Rapanos*, a five Justice majority of this Court held that federal jurisdiction did not extend to wetlands under the Clean Water Act based solely on a hydrological connection between those wetlands and a navigable-in-fact waterway downstream. But this Court split on the test for establishing such jurisdiction. A four Justice plurality interpreted the

Clean Water Act narrowly to cover traditional rivers, lakes, and streams connected to navigable-in-fact waters, and those wetlands "indistinguishable" from these waters. But Justice Kennedy, who concurred in the judgment, interpreted the Act broadly so as to reach any wetland with a "significant nexus" to navigable-in-fact waters.

The Circuit Courts of Appeals are split on how to apply this Court's *Rapanos* decision. In *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005) (cert. denied), the Seventh Circuit held that Justice Kennedy's "significant nexus" test was controlling. The Ninth Circuit came to the same conclusion in *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (cert. denied). But, the First Circuit expressly rejected this reading of *Rapanos* and held that Clean Water Act jurisdiction could be extended to inland wetlands based on *either* the plurality test *or* Justice Kennedy's "significant nexus" test. *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (cert. denied). The Eleventh Circuit in *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), then rejected the First Circuit "either/or" test and followed the Seventh and Ninth Circuits. The Fifth Circuit in this case added to the confusion by failing to adopt any controlling opinion in *Rapanos*, but expressly holding that "the Government has jurisdiction over waters that neighbor tributaries of navigable waters." *United States v. Lucas*, 516 F.3d at 326.

These circuit rulings conflict with this Court's analysis in *Marks v. United States*, 430 U.S. 188, 193 (1977), wherein this Court declared that in fragmented decisions "the holding of the Court may be viewed as that position taken by those Members *who concurred*

in the judgments on the narrowest grounds." (Citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (emphasis added).) Under a literal reading of *Marks*, the "narrowest grounds" in *Rapanos* is the plurality position because it is a logical subset of the Kennedy test. But not all courts follow a literal reading of *Marks*. Indeed, there is general disagreement among the circuits as to whether and how *Marks* applies to this Court's split decisions.

Review by this Court is necessary not only to resolve a clear and substantial conflict among the Circuit Courts as to enforcement of the Clean Water Act under *Rapanos*, but also to clarify this Court's interpretive rules for split opinions.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT THE STANDARD TO APPLY IN DETERMINING JURISDICTIONAL WETLANDS UNDER THE CLEAN WATER ACT

In *Marks*, this Court was clear: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*'" 430 U.S. at 193 (citing *Gregg*, 428 U.S. at 169 n.15) (emphasis added). Although this interpretive rule has been difficult in application, it has been recognized as the *only* approach sanctioned by this Court for interpreting

its split decisions. *In re Michael Francis Cook*, 322 B.R. 336, 341 (2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

The language of *Marks* was not unique to that case. It derived from this Court's decision in *Gregg v. Georgia*, 428 U.S. 153. In *Gregg*, this Court examined *Furman v. Georgia*, 408 U.S. 238 (1972), which involved a challenge to the constitutionality of a Georgia death penalty statute. In *Furman*, as in *Rapanos*, five Justices agreed in the judgments, but the Court was split on the legal standard that should be applied to death penalty cases. Two Justices who concurred in the judgments felt that capital punishment was unconstitutional in all cases whereas the other three Justices believed that capital punishment was unconstitutional only in the circumstances presented in that case. Thus in *Gregg*, this Court held: "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." 428 U.S. at 169 n.15.

In *Gerke*, 464 F.3d 723, which also involved a jurisdictional challenge to federal regulation of inland wetlands, the Seventh Circuit putatively relied on *Marks* to interpret *Rapanos*, but it changed the wording of the *Marks* rule, and therefore the test. In *Gerke*, the court cited *Marks* for the proposition that

> [w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have

> assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

Id. at 724 (citations omitted).

This adulterated version of the *Marks* rule allowed the Seventh Circuit to aggregate the four dissenters in *Rapanos* with Justice Kennedy to find five Justices that would support Justice Kennedy's "significant nexus" standard for establishing federal jurisdiction over wetlands under the Clean Water Act. However, the court ignored the more persuasive argument that when the plurality standard is applied to find federal jurisdiction, it would have the support of all nine Justices. But under *Marks*, finding the support of five Justices is not the test, especially in a case like *Rapanos* where five or more Justices would support more than one opinion. Rather, under *Marks*, lower-court judges are to look at the "narrowest grounds."

The First Circuit in *Johnson* found it curious that *Gerke* equated "narrowest grounds" with the opinion "least restrictive of federal authority." 467 F.3d at 61. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the First Circuit observed that this was mere coincidence and that it "does not necessarily mean that the Supreme Court in *Marks* equated the 'narrowest grounds' . . . to the grounds least restrictive of the assertion of federal authority." *Id.* at 63. "Such an equation," the court stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Id.* Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of

decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.*

In contrast to the Seventh Circuit's reading of *Marks* in *Gerke*, the First Circuit opined that the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground," citing *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1247 (11th Cir. 2001), or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases," citing Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420-21 (1992). *See also Johnson*, 467 F.3d at 63.

Relying on *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991), the First Circuit noted the D.C. Circuit found "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *Johnson*, 467 F.3d 63. "In other words," the First Circuit explained, "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other." *Id.* According to the First Circuit, *Marks* followed this approach. In *Marks* this Court examined *Memoirs v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), in which a majority of this Court held that a lower court

incorrectly concluded a book was obscene and did not have First Amendment protection. Three Justices decided that if materials are deemed obscene they should receive no First Amendment protection while two other Justices concluded that the First Amendment provided an absolute shield against government action. As a logical subset of the other, this Court concluded in *Marks* that the former opinion, excluding obscene materials from First Amendment protections, was the "narrowest grounds" for the judgment and the controlling opinion in the case.

Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-04 (1992).

In *Johnson*, the First Circuit noted that the Kennedy "significant nexus" standard in *Rapanos* is not a "logical subset" of the plurality standard for federal jurisdiction over wetlands: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would

limit jurisdiction." *Johnson*, 467 F.3d at 64. However, the First Circuit failed to consider the obvious possibility that the plurality standard is a "logical subset" of the Kennedy standard. This possibility was simply ignored. So broad is the Kennedy approach that the plurality found it barely distinguishable from the government's "any hydrological connection" test the majority struck down: "Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again." *Rapanos*, 547 U.S. at 757 n.15.

Thus, in *Rapanos*, the plurality's jurisdictional standard is comparable to the narrower strict scrutiny standard, whereas the Kennedy "significant nexus" standard is comparable to the broader rational basis standard. As Justice Stevens observed, it would be an "unlikely event that the plurality's test is met but Justice Kennedy's is not." *Id.* at 810 n.14.

In other words, the plurality opinion was decided on the "narrowest grounds," not because it is the most restrictive of federal authority, but because it is less sweeping and would require the same outcome in a subset of the cases as would the more sweeping Kennedy opinion. For this reason, the First Circuit rejected *Gerke*'s conclusion that under *Marks* Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit held that "*Marks* does not translate easily to the present situation," *Johnson*, 467 F.3d at 64, and that the "federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 60.

In *Northern California River Watch v. Healdsburg*, 496 F.3d 993, the Ninth Circuit adopted the approach of the Seventh Circuit holding that Justice Kennedy's

"significant nexus" standard is controlling in *Rapanos* under the *Marks* rule, thus creating an additional conflict among the Circuits. The Eleventh Circuit adopted this same approach in *United States v. Robison*, 505 F.3d at 1221, after expressly rejecting the First Circuit's "either/or" test put forward in *Johnson*. According to the Eleventh Circuit, "It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test" because, under *Marks*, the opinion of the dissenting Justices "is of no moment." *Id.* Finally, the Fifth Circuit in this case applied the jurisdictional tests of the *Rapanos* plurality, the concurrence, *and* the dissent as if they were all of equal validity without so much as a mention of the *Marks* rule. Then it perversely held that "the government has jurisdiction over waters that neighbor tributaries of navigable waters." *United States v. Lucas*, 516 F.3d at 326. This "neighboring" test is not found in the *Rapanos* decision, thus the Fifth Circuit introduced a new jurisdictional standard and an additional conflict among the circuits.

This conflict creates a substantial disparity between these circuits in the enforcement of the Clean Water Act which requires reconciliation by this Court.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER *MARKS* APPLIES TO THIS COURT'S SPLIT DECISIONS SUCH AS *RAPANOS*

As the First Circuit points out, a number of Circuits have abandoned this Court's *Marks* approach to

split opinions or applied *Marks* selectively. Instead, they have sought to divine the controlling opinion in this Court's fragmented decisions, like *Rapanos*, by adopting a "pragmatic" approach to the situation. This approach involves assessing which grounds would "command a majority of the Court." *Johnson*, 467 F.3d at 64-65. In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992), for example, the court concluded: "In essence, what we must do is find common ground shared by five or more justices." *See also United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("We need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'") (citing *Planned Parenthood v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991)).

The courts that have adopted this approach are not particular as to the Justices that may be joined in a "majority." In contrast to the directive in *Marks*, that the controlling opinion must be found among those Justices who concurred in the judgments, some Circuits give equal weight to the dissenting Justices. The Seventh Circuit in *Gerke*, which purported to apply *Marks*, relied on the fact that "any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters)." *Gerke*, 464 F.3d at 725. The First Circuit in this case used similar logic to justify its determination that federal jurisdiction over wetlands could be established under either the plurality test in *Rapanos* or the Kennedy test:

> If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction.

Johnson, 467 F.3d at 64.

In *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Labs*, 842 F.2d 1436 (3d Cir. 1988), the Third Circuit examined *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), to determine the controlling opinion. In *Pennsylvania*, this Court was asked to address the availability of contingency fees under federal fee-shifting statutes. This Court split along the lines of *Rapanos* with four Justices in the plurality, four Justices in the dissent, and Justice O'Connor's lone concurrence in the judgment. The Third Circuit determined that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court" and is controlling. *Student*, 842 F.2d at 1451.

In *King v. Palmer*, 950 F.2d 771, the D.C. Circuit took a different approach. According to *Johnson*, the D.C. Circuit "refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks's* [sic] language that the holding is the position of the Justices '*who concurred in the judgments* on the narrowest grounds.' " *Johnson*, 467 F.3d at 65 (citing *Marks*, 430 U.S. at 93). The D.C. Circuit relied as well on the fact that this Court "had not explicitly applied *Marks* to situations where

concurring and dissenting votes would be combined." *Id.*

More recently, although the Eleventh Circuit in *Robison* agreed with the Seventh Circuit in *Gerke*, that the Kennedy opinion in *Rapanos* was controlling under *Marks*, the Eleventh Circuit parted ways with *Gerke* in concluding that the *Rapanos* dissent was "of no moment." *Robison*, 505 F.3d at 1221.

This widespread circuit conflict has not gone unnoticed by this Court. This Court has remarked on how the *Marks*' inquiry has "so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 746 (1994). It is time, therefore, for this Court to address this conflict in the context of this case.

III

IN ADDITION TO THE CIRCUIT CONFLICTS, FAIRNESS AND JUSTICE WARRANT A REVIEW OF THIS CASE

For the first time, in this case, a residential septic system (like the millions used throughout the country) has been declared a "point source" under the Clean Water Act subject to NPDES permitting. Thus, without notice or precedent Petitioners have been fined millions of dollars and sentenced to federal prison for nearly a decade for a criminal act they could not have intended or even foreseen. This is a travesty of justice which, standing alone, warrants review by this Court. But there is more.

Since the promulgation of the Clean Water Act, the Corps of Engineers and the Environmental Protection Agency have failed to follow a consistent jurisdictional

test for regulated wetlands. A report from the General Accounting Office confirmed that the Army Corps of Engineers' local districts "differ in how they interpret and apply the federal regulations when determining which waters and wetlands are subject to the [Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004), *available at* http://www.gao.gov/new.items/d04297.pdf (last visited June 25, 2007) (GAO Report).

In addition to the interdistrict inconsistences, the GAO Report concluded that even Corps staff working in the same office cannot agree on the scope of the Clean Water Act and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act. GAO Report at 22. This is more than a theoretical concern. This degree of uncertainty permeates the enforcement decisions of the federal government. In this case, as in others, those decisions became the basis for multimillion dollar fines and criminal prosecution.

The right of the people to know when they have violated the law is deserving of greater safeguard than the convenience of the enforcing agency. But the scope of federal jurisdiction under the Clean Water Act is beyond the comprehension of ordinary people. The very definition of "wetlands" defies common sense. Federal regulations define "wetlands" as those areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in

saturated soil conditions." 33 C.F.R. § 328.3(b). Under this definition, an area need be wet only "for one to two weeks per year" to qualify as a "wetland." Gordon M. Brown, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a "wetland" may be mostly dry land.[2]

No reasonable person would conclude that mostly dry land is subject to federal control as a jurisdictional wetland. Ocie Mills and his son found this out the hard way. These two men were convicted in the Eleventh Circuit for filling "wetlands" on their property without a permit—an act a district court characterized as the innocuous placing of clean fill on dry land:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corp of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable waters of the United States."

United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

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[2] The definition of "discharge" also defies common sense. The Corps interprets that term to mean the mere movement of dirt in situ. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

For this offense, Mills and his son served 21 months in prison, one year in supervised release, paid $5,000 in fines, and were required to restore the site to its original condition. *Id.*

This Court has long held that "before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997). But the jurisdictional test applied in this case provides no such clarity. To the contrary, it is perfectly opaque. When, exactly, does a wetland "neighbor" an undefined "tributary"?

Similar questions were raised by the district court in *United States v. Chevron Pipe Line Company*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006), the first case to apply the *Rapanos* decision. That case involved an accidental discharge of oil into a dry, unnamed drainage ditch that flowed only during significant storm events. *Id.* at 607. Although the oil was cleaned up before it reached any water, as required by state law, and the nearest navigable-in-fact waterway was connected to the ditch by intermittent streams scores of miles away, the Corps of Engineers sought fines from the company for discharging into "navigable waters" without a federal permit. *Id.* at 607-08. Therefore, the court looked to *Rapanos* for guidance in determining the scope of federal jurisdiction.

The court was quick to dismiss the Kennedy approach as an unworkable standard. The court observed that Justice Kennedy "advanced an ambiguous test—whether a 'significant nexus' exists to waters that are/were/might be navigable." *Id.* at 613. According to the court, "[t]his test leaves no guidance

on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?" *Id.* (citations omitted). Therefore, instead of relying on the Kennedy opinion, the court based its decision on existing Fifth Circuit precedent and "the Supreme Court's plurality opinion in *Rapanos v. United States*" and concluded there was no federal jurisdiction. *Id.* at 615. That decision underscores the real world difficulties that are created for the enforcing agencies and the trial courts when this Court does not provide clear limits on federal authority.

The ambiguous standard imposed by the court in this case is sure to result in inconsistent and unpredictable applications of the law. Such a standard leaves the door open to continued federal overreach. Only this Court can strike the constitutional balance between federal power and individual rights. *See Johnson*, 467 F.3d at 66 (Torruella, C. J., dissenting).

CONCLUSION

There is a real and growing conflict among the circuits over federal wetland jurisdiction that must be resolved by this Court. There is also a real and growing conflict among the circuits over the applicability of the *Marks* rule in interpreting split decisions, like *Rapanos*, that must be resolved by this Court. These conflicts have now resulted in the criminal prosecution and imprisonment of ordinary citizens based on unsettled and contradictory jurisdictional standards under the Clean Water Act. Further inaction by this Court will result in continuing

uncertainty as to the scope of the Act and undermine the Constitution's safeguards against arbitrary enforcement of the law. Therefore certiorari should be granted.

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Respectfully submitted,

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